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EXAMINER

PM82/0802

WAYNE J. COLTON, INC.
THE MILAM BUILDING SUITE 1108
115 EAST TRAVIS STREET
SAN ANTONIO TX 78205

ART UNIT PAPER NUMBER
L00,1 34

3627
DATE MAILED:

08/02/00

This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS

☒ This application has been examined ☒ Responsive to communication filed on 11-22-99 ☒ This action is made final.

A shortened statutory period for response to this action is set to expire 3 month(s), 0 days from the date of this letter.
Failure to respond within the period for response will cause the application to become abandoned. 35 U.S.C. 133

Part I THE FOLLOWING ATTACHMENT(S) ARE PART OF THIS ACTION:

1. ☐ Notice of References Cited by Examiner, PTO-892.
2. ☐ Notice of Draftsman's Patent Drawing Review, PTO-948.
3. ☐ Notice of Art Cited by Applicant, PTO-1449.
4. ☐ Notice of Informal Patent Application, PTO-152.
5. ☐ Information on How to Effect Drawing Changes, PTO-1474.
6. ☐

Part II SUMMARY OF ACTION

1. ☒ Claims 1-22 are pending in the application.
Of the above, claims are withdrawn from consideration.
2. ☐ Claims have been cancelled.
3. ☐ Claims are allowed.
4. ☒ Claims 1-19, 21 and 22 are rejected.
5. ☒ Claims 20 are objected to.
6. ☐ Claims are subject to restriction or election requirement.
7. ☐ This application has been filed with informal drawings under 37 C.F.R. 1.85 which are acceptable for examination purposes.
8. ☐ Formal drawings are required in response to this Office action.
9. ☒ The corrected or substitute drawings have been received on 12-3-99. Under 37 C.F.R. 1.84 these drawings are ☒ acceptable; ☐ not acceptable (see explanation or Notice of Draftsman's Patent Drawing Review, PTO-948).
10. ☐ The proposed additional or substitute sheet(s) of drawings, filed on has (have) been ☐ approved by the examiner; ☐ disapproved by the examiner (see explanation).
11. ☐ The proposed drawing correction, filed has been ☐ approved; ☐ disapproved (see explanation).
12. ☐ Acknowledgement is made of the claim for priority under 35 U.S.C. 119. The certified copy has ☐ been received ☐ not been received ☐ been filed in parent application, serial no. ; filed on .
13. ☐ Since this application appears to be in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11; 453 O.G. 213.
14. ☐ Other

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EXAMINER'S ACTION

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Art Unit: 3627

DETAILED ACTION

Power of Agent and Intervention of Assignee

1. Applicant's paper of April 22, 1999, Power of Agent and Intervention of Assignee, in which the alleged assignee of the instant application assigns power of attorney to Wayne J. Colton is improper and has not been entered. The accompanying 3.73(b) certification bases the assignment of the instant application on the assignment of "grandparent" application 08/382,150. The alleged assignee in the instant application has assumed that title would transfer to the grandchild application (i.e., the instant application). The 3.73(b) certification mentions divisional, continuation or continuations-in-part (CIP).

As set forth in MPEP 306, assignment of a parent (original) application **does not** transfer to a CIP application, although it does transfer to a continuation. Therefore the intervention of assignee is ineffective since Kinetic Concepts, Inc is **not** the assignee of the instant application and its parent, application 08/767,291. The assignee is Bank of America as recorded on January 7, 1998 on reel 008896, frame 0699.

Thus, Applicant must provide a new 3.73(b) certification and power of agent/attorney.

Claim Rejections - 35 USC § 103

2. Claim 1 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 4,409,695 to Johnston et al. in view of U.S. Pat. No. 4,858,260 to Failor et al.

Johnston et al. disclose a bariatric bed comprising a frame adapted to support patients having weights in the range of 300-700 pounds. The frame comprises an articulated mattress support for supported a mattress including at least a first (6), second (5) and third (4) articulatable

Art Unit: 3627

sections positioned to support a leg region, a seat region and a head region, respectively. The bed further includes an articulation mechanism (50) for articulating the mattress support from a relatively horizontal, lying position to a seated position including a head-up jack (50) and a leg-down jack (50). The bed also includes a foot board assembly and a radiolucent section (63) having a cavity (65) for the insertion of X-ray film material so as to allow radiographic examination of a patient while positioned upon the mattress support. The cavity is accessible from either side of the bed.

Johnston et al. fail to teach the bariatric bed also comprising a raise-and-lower mechanism for generally raising and lowering the entire mattress support relative to a floor engaging portion of the frame and controls for tilting the mattress support lengthwise. However, Failor et al. disclose a patient transport apparatus comprising a raise-and-lower mechanism for generally raising and lowering the support relative to a floor engaging portion of the frame and controls for tilting the support lengthwise, hence providing Trendelenburg and/or reverse Trendelenburg capabilities. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the bed of Johnston et al. with a raise-and-lower mechanism so as to be able to raise and lower the mattress support and controls for tilting the bed lengthwise so that the bed can be placed in Trendelenburg and/or reverse Trendelenburg positions, as taught by Failor.

3. Claims 2-13, 15-19, 21 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnston et al. in view of Failor et al. as applied to claim 1 above, and further in view of U.S. Pat. No. 5,205,004 to Hayes et al.

Johnston et al., as modified, disclose the claimed invention except for the raise-and-lower mechanism comprising a head end torque arm and a leg end torque arm being pivotally disposed on the frame at a first pair of later diverse points and a second pair of lateral diverse points, respectively. Hayes et al. disclose a vertically adjustable and tiltable bed frame comprising a raise-

Art Unit: 3627

and-lower mechanism including a head end torque arm (46, 64, 42) and a leg end torque arm (48, 44) wherein each of the torque arms are independently actuatable by motor jacks (60, 62).

As concerns claim 17 and 18, the four jacks are cooperatively adapted to position the mattress support as a cardiac chair and to also facilitate patient ingress and egress over the leg region of the mattress.

As concerns claims 21 and 22, Johnston et al. also discloses the bed having a plurality of laterally adjustable side rails with one of the rails being provided with controls (57, 58) for controlling articulation of the mattress support.

4. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Johnston et al. in view of Failor et al. and Hayes et al. as applied to claim 3 above, and further in view of U.S. Pat. No. 5,393,938 to Bumbalough.

Johnston et al., as modified, disclose the claimed invention except for the frame having an integral scale for determining the weight of a patient positioned upon the mattress. Bumbalough discloses, at col. 1, lines 12-20, that it is well known in the art to provide beds with scales built into the frame for weighing a person lying in the bed. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the bed of Johnston et al., as modified, with an integral scale so as to be able to weigh the person lying in the bed.

Allowable Subject Matter

5. Claim 20 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Art Unit: 3627

The following is a statement of reasons for the indication of allowable subject matter: The prior art fails to teach a bed comprising a foot board assembly having a dampening member being adapted to prevent rapid returns of the foot board assembly to its resting position.

Response to Arguments

6. Applicant's arguments filed November 15, 1999 have been fully considered but they are not persuasive.

In response to applicant's argument regarding claim 1, the question of obviousness can not be approached on the basis that an artisan having ordinary skill would have known only what they read in the references, because such artisan must be presumed to know something about the art apart from what the references disclose. See *In re Jacoby*, 309 F.2d 513, 135 USPQ 317 (CCPA 1962). The test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. See *In re Young*, 927 F.2d 588, 591, 18 USPQ 1089, 1091 (Fed. Cir. 1991) and *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). A case of obviousness is established where the reference teachings would appear to be sufficient for one of ordinary skill in the art having those teachings before him to make the proposed combination or modification. See *In re Lintner*, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

While there must be some suggestion or motivation for one of ordinary skill in the art to combine the teachings of references, it is not necessary that such be found within the four corners of the references themselves; a conclusion of obviousness may be made from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference. See *In re Bozek*, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969).

Art Unit: 3627

See also *B.F. Goodrich Co. v. Aircraft Braking Systems Corp.*, 72 F.3d 1577, 1583, 37 USPQ2d 1314, 1319 (Fed. Cir. 1996) and *In re Nilssen*, 851 F.2d 1401, 1403, 7 USPQ2d 1500, 1502 (Fed. Cir. 1988). Further, in an obviousness assessment, skill is presumed on the part of the artisan, rather than the lack thereof. *In re Sovish*, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1984). Insofar as the references themselves are concerned, the Examiner is bound to consider the disclosure of each for what it fairly teaches one of ordinary skill in the art, including the inferences which one of ordinary skill in the art would reasonably have been expected to draw therefrom. See *In re Boe*, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966) and *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

In the instant application, one of ordinary skill in the adjustable bed art would have appreciated the importance of therapeutic modalities such as Trendelenburg therapy, as acknowledged by Applicant, and accordingly would have been motivated thereby to provide such therapeutic modalities on the Johnston bariatric bed since obese patients would benefit from such clinical modalities as much as "normal" weight patients.

Conclusion

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from

Art Unit: 3627

the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to **Teri Pham Luu** whose telephone number is **(703) 305-7421**. The examiner can normally be reached on Monday-Wednesday from 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, **BethAnne Dayoan**, can be reached at **(703) 308-3865**.

Submission of your response by facsimile transmission is encouraged. Group 3620's facsimile number is **(703) 305-3597**. Recognizing the fact that reducing cycle time in the processing and examination of patent applications will effectively increase a patent's term, it is to your benefit to submit responses by facsimile transmission whenever permissible. Such submission will place the response directly in our examining group's hands and will eliminate Post Office processing and delivery time as well as the PTO's mail room processing and delivery time. For a complete list of correspondence **not** permitted by facsimile transmission, see MPEP § 502.01. In general, most responses and/or amendments not requiring a fee, as well as those requiring a fee but charging such fee to a deposit account, can be submitted by facsimile transmission. Responses requiring a fee which applicant is paying by check **should not be** submitted by facsimile transmission separately from the check.

Responses submitted by facsimile transmission should include a Certificate of Transmission (MPEP § 512). The following is an example of the format the certification might take:

I hereby certify that this correspondence is being facsimile transmitted to the Patent and Trademark Office (Fax No. (703) 305-3597) on _____ (Date) _____

(Typed or printed name of person signing this certificate)

(Signature)

If your response is submitted by facsimile transmission, you are hereby reminded that the original should be retained as evidence of authenticity (37 CFR 1.4 and MPEP § 502.02). Please


Art Unit: 3627

do not separately mail the original or another copy unless required by the Patent and Trademark Office. Submission of the original response or a follow-up copy of the response after your response has been transmitted by facsimile will only cause further unnecessary delays in the processing of your application; duplicate responses where fees are charged to a deposit account may result in those fees being charged twice.

Communications via Internet e-mail regarding this application, other than those under 35 U.S.C. 132 or which otherwise require a signature, may be used by the applicant and should be directed to **bethanne.dayoan@uspto.gov**.

All Internet e-mail communications will be made of record in the application file. PTO employees do not engage in Internet communications where there exists a possibility that sensitive information could be identified or exchanged unless the record includes a properly signed expressed waiver of the confidentiality requirements of 35 U.S.C. 122. This is more clearly set forth in the Interim Internet Usage Policy published in the Official Gazette of the Patent and Trademark on February 25, 1997 at 1195 OG 89.

Any inquiry of a general nature relating to the status of this application should be directed to the group receptionist at **(703) 308-2168**.


TERI PHAM LUU
PRIMARY EXAMINER

tpl
August 2, 2000